IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.129 OF 2005

Ankush Sadashiv Yadav : Appellant.

versus

Mrs.Poonam Ankush Yadav : Respondent

Mr.U.P.Warunjikar for the appellant.

Mr.S.A.Sawant for the respondent.

CORAM : D.G.DESHPANDE,J.

DATED : 26th August 2005.

ORAL ORDER

1. Appellant is the father and Respondent is the mother of the minor child Shivam. Mother/respondent filed an application before the District Judge, Pune for custody under Section 25 of the Guardians and Wards Act. That application was the Civil Misc.Application No.851 of 2000. Additional Sessions Judge, Pune rejected that application and dismissed it. The wife preferred

an appeal to this Court vide First Appeal No.1228 of 2003 and produced certain additional material. Therefore, the appeal was partly allowed. Impugned order was set aside and the matter was remanded back to the 4th Additional District Judge, Pune and, the appellant was permitted to apply for amendment of the petition etc. After remand the 4th Additional Sessions Judge, Pune allowed the application directing the appellant to hand over the custody of the child Shivam to the petitioner. Therefore, this appeal.

2. Order of remand came to be passed on the basis of the Additional Affidavit of the appellant/wife in that earlier appeal. Certain copies of the statements recorded by the police were annexed. Those statements were with reference to the allegations of bigamous marriage of the husband/father. The other material was that the husband/father was addicted to liquor and was creating scene in the society.

3. It appears from the record that after the remand, the wife/mother applied for amendment of her petition. That was carried out by way of addition of Para 7A and 7B. It was alleged in

those paras that the husband/father has contracted second marriage with one Savita and that Savita was residing in the house of the husband/father. It was also alleged in the amendment that the husband/father was facing the prosecution in various criminal cases including misbehaviour under the influence of liquor. One PSI Gorakhnath Karande was examined by the wife to show that Savita, - the so called second wife, was residing with the husband/father as mistress.

4. The husband/father has denied all these allegations of second marriage and misbehaving under the influence of liquor.

5. It was the case of the wife/mother in the original application that she was ill-treated and assaulted physically many times by the husband and his family members. Threats to kill her son were given, if she reported the matter to the police about this ill-treatment. She was actually pushed from the gallery of the terrace, but she was made to say that she felt down while she was trying to dry clothes on the terrace. Similar threats on this occasion were given to her and her parents not to disclose it to the

police.

6. As a result of this fall she has become permanently disabled is an admitted fact. She also admitted that she was bed ridden and cannot move on her own in spite of using crutches. She was refused to have an access of her child, not permitted to talk with him and, thereafter, the husband performed the 2nd marriage. Therefore, in this background, this application for custody was filed.

7. All these allegations of the wife/mother about cruel treatment were denied by the husband/father. It was contended that she felt down from the terrace because their domestic pet i.e. the dog was playing on the terrace and the wife lost balance and felt down. She was admitted in the hospital by the husband and she was looked after and taken care of.

8. Though after remand the wife has made number of allegations against the husband. She has totally failed to prove any one of them. She completely failed to prove the so called 2nd

marriage of the husband. When questioned as to what is the evidence adduced by the wife to prove the second marriage, the counsel for the wife, relied upon some statements recorded by the police during investigation and the opinions of the Investigating Officer which are formed on the basis of those statements to the effect that the husband was living with the so called second wife. This cannot be taken as the evidence and as a proof of second marriage. Then some reliance was placed upon the news paper reports regarding misbehaviour of the husband in a public place. Those reports are no proof of misbehaviour in a public place i.e. in temple under the influence of liquor. In fact all these submissions of the wife are totally irrelevant for deciding the question of custody.

9. The order that came to be passed after the remand is in favour of the wife. Her case, that the husband has contracted 2nd marriage was not believed, but the court came to the conclusion that the husband has kept a mistress i.e. Savita. For this purpose the Court took into consideration the copy of the report filed by the Investigating Officer when investigation

was ordered under Section 155(2) of the Cr.P.C. That report was Exhibit 76. The officer was examined in court. In the cross examination he stated that Savita was occasionally staying with the husband Ankush Yadav. A suggestion was put to him that Ankush Yadav - husband has never stated in his statement to the police that Savita was residing with him as a mistress. This statement has been taken by the Court as an admission in coming to the conclusion that husband Ankush Yadav had a mistress by name Savita.

10. The whole approach of the court is totally wrong, erroneous and contrary to law. Information collected by the investigating officer during investigation are hearsay, that they are the opinions of the police and they are not admissible in evidence, they have no evidentiary value for the purpose of proving the second marriage or for the purpose of proving that the husband-Ankush Yadav had kept a mistress. The wife should have come with some better evidence which was admissible and permissible under the Evidence Act. The court has committed a grave error in relying upon this

evidence of the investigating officer for coming to the aforesaid conclusion.

11. The wedding invitation card (Exh.57) was placed on record by the wife where against the name of Ankush - the husband, the name of Savita is mentioned, and the court inferred that prima facie the Savita must be residing with Ankush in May 2003. The husband has examined Gulab Yadav who is the father of Santosh whose marriage was performed on 21.5.2000 and, according to him, this was a printing mistake in the card. The most important piece of evidence on record was the public notice given in daily Prabhat on 28.4.2004 by the husband where in there appears to be denial of by the husband of any concern or relationship with Savita. The court treated this public notice as an after thought and came to the conclusion that Savita was the mistress of the husband.

12. All these evidence are totally wrong. There is no evidence to conclusively prove that the husband was having mistress even on the test of preponderance of probabilities. This evidence is not sufficient. These findings of the court

are liable to be set aside.

13. Regarding aspect of custody, the Lower Court, though considered the welfare of the child, wrongly came to the conclusion that the welfare of the child will be best looked after by giving custody to the wife when the wife is permanently disabled, was required to use wheel chair and she could not perform her daily chorus by herself and was constantly required to be attended to by somebody else for her physical requirements and needs. She has also no source of income. In these circumstances, granting custody of the child to the wife was totally wrong and erroneous. In fact, in the earlier order before remand, this aspect was rightly and properly considered. Therefore, for all these reasons, the appeal is required to be allowed. Hence I pass the following order.

:ORDER:

The Appeal of the appellant/husband is allowed.

The order of the Additional District

Judge, Pune dated 23.12.2004 directing the present appellant/father to hand over the custody of the the child to the respondent/mother is set aside and, the earlier order of the same court dated 28.7.2004 dismissing her petition is up held.

The custody of child Shivam will remain with the appellant/father henceforth. The respondent/mother will have right of access to the child Shivam on Saturday and Sunday.

[D.G.DESHPANDE,J]

After this order was pronounced, the counsel for the respondent/mother prays for stay of operation of this order. Prayer for stay is rejected.

[D.G.DESHPANDE,J]